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## HIV Employment Discrimination in Air Transportation

Brian C. McCormack

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# HIV EMPLOYMENT DISCRIMINATION IN AIR TRANSPORTATION

BRIAN C. McCORMACK

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## I. INTRODUCTION

**T**WO UNITED AIRLINES pilots who are infected with the Human Immunodeficiency Virus (HIV) allege that they were grounded by United in 1994 solely because of their HIV-positive status.<sup>1</sup> The pilots claim discrimination under the Americans with Disabilities Act<sup>2</sup> (ADA). United responds that the pilots had a "disqualifying condition," and, therefore, the ADA does not protect these men.<sup>3</sup> The issue apparently is whether the pilots' HIV infections had progressed to the point that they would be considered to have Acquired Immune Deficiency Syndrome (AIDS).<sup>4</sup> According to an FAA spokesman, a pilot may be disqualified from flight duties if that pilot is diagnosed with AIDS.<sup>5</sup> Since commercial pilots must be medically certified by the FAA, the FAA's position on the subject will be controlling unless it is found to be outside statutory bounds. No matter the final outcome of the case, what was previously the subject of much hypothetical debate among the community of flight surgeons and

<sup>1</sup> James F. Peltz & Stuart Silverstein, *HIV-Infected Laguna Pilot Sues Airline*, L.A. TIMES, Apr. 12, 1995, at A1.

<sup>2</sup> 42 U.S.C. §§ 12101-12117 (Supp. V 1993).

<sup>3</sup> Peltz & Silverstein, *supra* note 1, at A1 (quoting Dr. Gary Kohn, medical director for United Airlines).

<sup>4</sup> AIDS is a disease that robs the body of its ability to fight infection.

<sup>5</sup> Peltz & Silverstein, *supra* note 1, at A1.

other medical professionals concerned with air safety and HIV<sup>6</sup> has now become the subject of an actual legal dispute.

The final outcome of the dispute will have an impact on how speculative an employer may be in discriminating against a class of disabled persons because their disabilities pose an alleged "direct threat" to the individuals or to others.<sup>7</sup> Further, the case will affect the degree to which employers may use "proxies" (or substitute criteria) in place of a person's actual, measured ability to perform a job. Clearly the flying public must be protected; however, care must be taken to avoid overreacting to a disease that has inspired extreme prejudice and phobia.

Air transportation workers with HIV stand in a precarious position, representing the confluence of three of America's common phobias—acrophobia, virophobia,<sup>8</sup> and perhaps, homophobia.<sup>9</sup> This Comment will evaluate permissible and impermissible forms of discrimination against HIV-positive individuals under the relevant federal anti-discrimination statutes. A

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<sup>6</sup> See, e.g., Aerospace Med. Ass'n, *HIV Positivity and Aviation Safety*, 63 AVIATION, SPACE, & ENVTL. MED. 375 (1992). The Journal of Aviation, Space, and Environmental Medicine has probably dealt more frequently with the issue of HIV-positive aviators than any other publication. See, e.g., Hugo O. Leimann Patt et al., *HIV-Encephalopathy: Should We Await a Catastrophe Before Screening?*, 65 AVIATION, SPACE, & ENVTL. MED. 70 (1994); Robert L. Mapou et al., *Measuring Performance Decrements in Aviation Personnel Infected with the Human Immunodeficiency Virus*, 64 AVIATION, SPACE, & ENVTL. MED. 158 (1993); Olna Selnes & Eric Miller, *Letter to the Editor: Asymptomatic HIV-1 Infection and Aviation Safety*, 64 AVIATION, SPACE, & ENVTL. MED. 172 (1993).

<sup>7</sup> A defense to a claim of discrimination under the ADA is that the discrimination was made because an individual posed a "direct threat" to himself, a co-worker, or the public. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(r) (1994).

<sup>8</sup> One commentator notes:

Many Americans continue to believe erroneously that AIDS is transmitted through public toilets, shaking hands, and kissing. In reality, the Human Immunodeficiency Virus (HIV) is transmitted by injection of infected blood, by unprotected sex with an infected person, and by 'vertical' transmission from an infected mother to her fetus or newborn.

John M. Casey, Comment, *From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act*, 17 U. PUGET SOUND L. REV. 381, 393 n.63 (1994).

<sup>9</sup> Although the majority of new cases of HIV infection occur in the heterosexual population, the disease is still widely, and perhaps correctly, perceived as a gay man's disease. The gay community is still disproportionately affected by HIV infection. For example, a 1993 study projected that if current rates of infection continue, a majority of 20-year-old gay and bisexual men nationwide will eventually contract HIV. Patrick Rogers, *Surviving the Second Wave*, NEWSWEEK, Sept. 19, 1994, at 50.

permissible form of discrimination exists when it is impractical to make individualized assessments of the individual's qualifications.<sup>10</sup> However, this Comment concludes that when such an individualized assessment cannot be made, an employer should be required to choose a proxy that best mirrors the disqualifying trait. Among HIV-positive individuals, the disqualifying trait will be the diminished mental capacity that sometimes occurs when such an individual's immune response system becomes severely diminished.<sup>11</sup> Some argue that mere HIV positivity may be used as a proxy for individualized assessment of the diminished mental capacity that sometimes accompanies AIDS and therefore as a proxy for actual performance-based testing of a worker's medical competence to perform her job.<sup>12</sup> This Comment will urge that a more appropriate proxy for workers who are centrally responsible for air traffic safety would be a test that measures an individual's immunosuppression.<sup>13</sup> Finally, this Comment calls for statutory protections of the confidentiality of immunosuppression test results analogous to those enacted in many states that protect the confidentiality of HIV test results. Tremendous stigmas are placed on many persons with disabilities, especially when that disability is infection with the virus that causes AIDS, the HIV virus.<sup>14</sup> As a result, the consequences of an HIV-positive reading are grave—even if the test is shown later to be false.<sup>15</sup> Thus, confidentiality remains a critical element of any program in which persons are tested for HIV or

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<sup>10</sup> See *infra* notes 150-61.

<sup>11</sup> During the asymptomatic phase of HIV infection, an infected person's immune response is gradually weakened until that person is no longer able to resist opportunistic diseases. This process is known as immunosuppression. When the person reaches a point of severe immunosuppression, he/she contracts one of a number of opportunistic infections, and is considered to have AIDS. Centers for Disease Control and Prevention, *HIV/AIDS Surveillance Report*, at Table 11, Vol. 5, No. 4 (1994).

<sup>12</sup> See generally Leimann Patt et al., *supra* note 6.

<sup>13</sup> One such test that is widely used is the CD4+ test, which measures the number of CD4+ lymphocytes in a given volume of blood. Such measurements are commonly known as "T-cell counts." See, e.g., Barbara J. Turner et al., *CD4+ T-Lymphocyte Measures in the Treatment of Individuals Infected With Human Immunodeficiency Virus Type 1: A Review for Clinical Practitioners*, 154 ARCHIVES INTERNAL MED. 1561 (1994).

<sup>14</sup> BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS, AND PROBLEMS* 318 (1991).

<sup>15</sup> See, e.g., *Doe v. Borough of Barrington*, 729 F. Supp. 376, 379 (D.N.J. 1990) (discussing consequences of a police officer disclosing to the public that a man had AIDS, e.g., parents withdrawing children from school because the man's children went to the school); see also *id.* at 384 n.8 (listing numerous events in which

other characteristics, such as immunosuppression, which are suggestive of HIV infection.

## II. IN THE NEWS: AIRLINES AND THE U.S. GOVERNMENT DISCRIMINATE AGAINST HIV-POSITIVE INDIVIDUALS AND PERSONS WITH AIDS

Employers today sometimes attempt to fire or refuse to hire HIV-positive individuals. Employers give many reasons for discriminating in employment against HIV-positive individuals: insurance and medical costs,<sup>16</sup> fears of safety for customers and co-workers, and sometimes prejudice against homosexuals who also happen to be HIV-positive.<sup>17</sup> The stated fear today, at least in the context of air traffic safety, is not of a Rube Goldberg set of improbable events leading to an intermingling of body fluids<sup>18</sup> but of a diminished mental capacity often accompanying the outbreak of AIDS.<sup>19</sup> A board of trustees of the American Medical Association (AMA) has recommended that the AMA express its concern over the "lack of research on qualifications for certification of pilots in the early stages of [HIV] infection[s]."<sup>20</sup> The board of trustees further recommended that pilots voluntarily report their HIV status to the FAA "so safety determinations can be made."<sup>21</sup> In response, the Aerospace Medical Association (AsMA) called the report "naive," implying that pilots' sense of invincibility would prevent them from voluntarily disclosing any medical problem they might have.<sup>22</sup> The AsMA has called for mandatory HIV testing of all pilots and for grounding

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persons were stigmatized and harassed for having AIDS or for being HIV-positive).

<sup>16</sup> Cf. *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991) (holding that an employer may tailor the provisions of the company's self-insurance plan to cap benefits for AIDS treatments to \$10,000, even when the company had only one employee with AIDS and that employee had already exceeded or nearly exceeded the new cap).

<sup>17</sup> *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994).

<sup>18</sup> But see *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 417 (N.D. Ohio 1991) (holding that mandatory testing of municipal fire fighters was a permissible Fourth Amendment search because the "risk of HIV transmission in the performance of the duties of firefighter paramedic[s] is high.").

<sup>19</sup> See *Changes in East Coast Routes Offer Potential to Reduce Delays*, AVIATION WK. & SPACE TECH., Feb. 23, 1987, at 36.

<sup>20</sup> Rebecca Voelker, *Here's What to Look for in Disability Coverage for HIV*, 35 AM. MED. NEWS, Dec. 21, 1992, at 8.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

of those pilots who are HIV-positive, whether the pilots have AIDS or not.<sup>23</sup>

Unfortunately, some pilots do have the HIV virus. Airlines thus must decide how to proceed with regards to employment of HIV-positive pilots. Since all pilots must be certified by the FAA, the position of the FAA on this issue is extremely important. Currently, the FAA has resisted the extreme position urged by the AsMA. Instead FAA policy allows a pilot to be grounded if the pilot is diagnosed as having AIDS, but the pilot is not automatically disqualified by mere virtue of having the HIV antibodies.<sup>24</sup> One of the plaintiff United Airlines pilots has interpreted FAA policy as allowing a pilot to be grounded only if the pilot has one of the AIDS-characteristic infections or is taking anti-viral drugs.<sup>25</sup>

HIV discrimination exists in many areas of air transportation. For example, the United States government has discriminated<sup>26</sup> against HIV-positive individuals employed in the field of air transportation. In 1989 the FAA suspended air traffic controller R.L. Wilkinson immediately upon learning that Mr. Wilkinson was HIV-positive.<sup>27</sup> Only after Mr. Wilkinson was nearing the end of a fourteen-month leave without pay did the FAA attempt to make any accommodation for his condition.<sup>28</sup> The death of the plaintiff's decedent in *Jenkins* mooted the allowable claims for equitable relief under the Rehabilitation Act;<sup>29</sup> however, the plaintiff was allowed to bring an equitable action against the

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<sup>23</sup> Aerospace Med. Ass'n, *HIV Positivity and Aviation Safety*, 63 AVIATION, SPACE, & ENVTL. MED. 375 (1992). See *supra* note 6, for a listing of articles in The Journal of Aviation, Space, and Environmental Medicine (which is published by AsMA) dealing with the issue of HIV-positive aviators.

<sup>24</sup> Peltz & Silverstein, *supra* note 1, at A1.

<sup>25</sup> *Id.*

<sup>26</sup> The term "discrimination" is used here without judgment as to the appropriateness of the particular action. Although "discrimination" has perhaps become synonymous with impermissible discrimination, at times discrimination is not only appropriate but necessary. In the extreme case, for example, none would argue that airlines should not discriminate against visually-impaired individuals when hiring pilots. HIV positivity presents a more controversial issue because unlike sight, HIV positivity by itself has nothing to do with piloting an airplane. For this reason air transportation workers should not be terminated merely because they are HIV-positive.

<sup>27</sup> *Jenkins v. Skinner*, 771 F. Supp. 133, 134 (E.D. Va. 1991). Apparently Mr. Wilkinson's supervisor feared that Mr. Wilkinson's physical and mental abilities would be diminished by his disease since Mr. Wilkinson certainly was not in a position of public contact.

<sup>28</sup> *Id.* at 135.

<sup>29</sup> *Id.* at 136.

FAA under the Rehabilitation Act for reinstatement of leave donated to the decedent by his co-workers.<sup>30</sup>

Airlines allegedly have fired or refused to hire flight attendants because of their HIV-positive status. Mark Olinger filed a claim in 1991 with the Chicago Human Relations Commission accusing Midway airlines of violating the city's human rights ordinance.<sup>31</sup> According to Mr. Olinger, Midway fired him because he is HIV-positive and because he is a homosexual. Mr. Olinger believes the airline became aware of his condition through his insurance records.<sup>32</sup>

In another case, a flight attendant brought an action against his doctor for disclosing his HIV-positive status to his employer in a workman's compensation proceeding.<sup>33</sup> The facts of this case did not indicate whether the airline fired the employee because of his HIV status. At a minimum the doctor jeopardized the plaintiff's social and employment status by making such a disclosure. Indeed, the flight attendant had specifically asked the doctor to keep his HIV status confidential because he feared the airline's reaction.<sup>34</sup>

In *Doe v. City of New York*, Delta Air Lines declined to offer a man a position, allegedly because he was a homosexual who was HIV-positive. The incidents giving rise to the man's original complaint against Delta Air Lines occurred in 1991, when Delta assumed many of the routes formerly flown by Pan Am, which was then in bankruptcy. Delta also hired many of the former Pan Am employees.<sup>35</sup> Delta's standards were apparently quite exacting—requiring applicants to sign waivers authorizing Delta to inquire into the applicant's "character . . . and mode of living."<sup>36</sup> An interviewer for Delta apparently made some assumptions about the "mode of living" of one applicant for a job as a flight attendant, based upon the applicant's "delicate personality."<sup>37</sup> It is not known whether Delta declined to hire this man because of a perception that a man with a "delicate personality"

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<sup>30</sup> *Id.* at 137.

<sup>31</sup> Alan Rittner, *Man Takes Stand Against Airline: North-Sider Believes Testing HIV-positive Led to Firing*, CHI. TRIB., June 12, 1991, at 2.

<sup>32</sup> *Id.*

<sup>33</sup> *Doe v. Roe*, 190 A.D.2d 463, 463 (N.Y. App. Div. 1993).

<sup>34</sup> *Id.*

<sup>35</sup> *Doe v. City of New York*, 825 F. Supp. 36, 37 (S.D.N.Y. 1993).

<sup>36</sup> Elaine Rivera & J.R. Anderson, *Delta Told: Back Off*, NEWSDAY, Nov. 7, 1991, at 3.

<sup>37</sup> The interviewer wrote that the applicant was a "delicate personality" on his interview form. *Automakers*, ORLANDO SENTINEL TRIB., Aug. 7, 1992, at C5.



was more likely to have AIDS, or just because Delta did not want to hire gay men.<sup>38</sup> In either case, Delta eventually hired the applicant as part of an agreement reached when the applicant filed a claim with the state human rights agency.<sup>39</sup>

Airlines have also denied gate agents and reservations agents employment because of their HIV status. In an HIV discrimination suit against Delta Air Lines by terminated gate agent Joseph Sullivan, the plaintiff discovered that he was on a management-compiled list of thirteen "known or suspected HIV-positive Delta workers."<sup>40</sup> Although Mr. Sullivan was unsuccessful in his HIV discrimination claim, a San Mateo jury awarded him \$275,000 for invasion of privacy.<sup>41</sup>

### III. THE SOURCES OF LEGAL CLAIMS AGAINST EMPLOYERS FOR HIV DISCRIMINATION<sup>42</sup>

Although the above cases "in the news" comprise both federal and state causes of action, this Comment will not cover sources of legal claims against air transportation employers other than those found in federal law. There are several reasons for the decision not to report on applicable state claims: major federal statutes exist under which causes of action will generally be available; determining when state causes of action will not be preempted by federal aviation law is a difficult undertaking and is beyond the scope of this Comment;<sup>43</sup> HIV infection is a politically-charged topic and it is unlikely that there is an emerging consensus of state approaches; and to the extent states have statutes against discrimination by reason of physical disability, these statutes will frequently mirror the applicable federal statutes.

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<sup>38</sup> It seems likely that "delicate personality" was a euphemism for male homosexuality.

<sup>39</sup> The actual subject matter of the case that reached the New York state trial and appellate courts was a breach by the Commission of the confidentiality clause of the agreement. *Doe v. City of New York*, 15 F.3d 264, 266 (2d Cir. 1994) (holding that Doe had a "right to privacy (or confidentiality) in his HIV status").

<sup>40</sup> Jorge Aquino, *Jury's Confusion Was 'Substantial'*, THE RECORDER, May 13, 1994, at 1.

<sup>41</sup> John Woolfolk, *Fired Delta Worker Wins Partial Victory in Lawsuit*, S.F. CHRON., May 10, 1994, at C14 (reporting on *Sullivan v. Delta Air Lines Inc.*, 380580 (San Mateo County 1994)).

<sup>42</sup> 29 U.S.C. §§ 701-718b (1988 & Supp. V 1993).

<sup>43</sup> For a discussion of this topic, see Franklin A. Nachman, *Hiring, Firing, and Retiring: Recent Developments in Airline Labor and Employment Law*, 53 J. AIR L. & COM. 31 (1987).

Accordingly, the major federal sources of claims against employers for HIV discrimination are summarized below.

#### A. THE CONSTITUTION

A first potential source of protection for the HIV-positive air transportation worker might be the United States Constitution.<sup>44</sup> Although private employers such as the airlines and privately-operated air traffic control facilities would not normally be bound by the Constitution, where the private employer is acting as an instrument or agent of the government the private employer will be found to be a government actor.<sup>45</sup>

Some commentators have argued that claims of discrimination against persons with disabilities should be entitled to heightened constitutional scrutiny.<sup>46</sup> Although the Supreme Court in *Cleburne v. Cleburne Living Center*<sup>47</sup> purportedly accorded no more than rational basis review to a city's decision to require a home for the mentally disabled to apply for a special use zoning permit,<sup>48</sup> the Court still found the city's action to be unconstitutional.<sup>49</sup> The Court apparently applied a heightened rational basis review in *Cleburne*. One commentator alleges that "[t]he Court's failure to apply the traditional deferential approach in these situations seems to be a judicial response to statutes creating distinctions among classes that the Court deems 'suspect' in nature, but yet appears unwilling to label as such."<sup>50</sup> It can be argued that Congress, by the ADA, has made a determination that the disabled are a suspect class deserving of heightened constitutional protection. It can be argued further that the Court should take its cue from Congress in conferring

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<sup>44</sup> 42 U.S.C. § 1983 (1988) provides that a government actor may be liable for the deprivation of a person's constitutional rights.

<sup>45</sup> *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615-16 (1989) (holding that a railroad acting under rules promulgated by the Federal Railroad Administration was a state actor whose actions were subject to constitutional scrutiny).

<sup>46</sup> See generally Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435 (1986); Joseph Loparco, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PAGE L. REV. 621 (1995); see also *Doe v. City of Chicago*, 883 F. Supp. 1126 (1994) (holding that a protected class for purposes of equal protection analysis may be formed, as a matter of law, by persons with HIV).

<sup>47</sup> 473 U.S. 432 (1985).

<sup>48</sup> *Id.* at 435-36.

<sup>49</sup> *Id.* at 450.

<sup>50</sup> Loparco, *supra* note 44, at 644.

suspect class status to the disabled.<sup>51</sup> This Comment raises, but does not attempt to further address, the issue of constitutional equal protection claims by disabled persons. The reason for this is because, as discussed below, the better solution within the aviation context is for Congress and federal agencies to produce more explicit guidelines with respect to state-employed, HIV-positive aviators and other air transportation employees.

In *Skinner v. Railway Labor Executives' Association (RLEA)*, the Court held that the taking of blood samples by a railroad acting under rules promulgated by the Federal Railroad Administration was a Fourth Amendment search.<sup>52</sup> In the air law context, employers perform certification of pilots, navigators, and flight engineers in accordance with FAA regulations.<sup>53</sup> Clearly the taking of blood samples for HIV testing as a part of FAA certification will be a Fourth Amendment search as it was in *RLEA*.<sup>54</sup>

The question that must be answered is whether the Fourth Amendment search is a reasonable one; since the Fourth Amendment only proscribes unreasonable searches and seizures. The reasonableness of searches is determined under the "special needs" doctrine under which the Court has disposed of the warrant requirement for public employers' searches when "substantial government interests . . . outweighed the employee's expectations of privacy."<sup>55</sup>

With respect to the reasonableness of nonconsensual seizures of blood for HIV testing, when a potential for transmission of the virus allegedly exists, the courts may perform an appropriate Fourth Amendment analysis of whether the testing is a justifiable "intrusion into employee privacy."<sup>56</sup> Given the scientific consensus that in most workplaces the accidental transmission of HIV infection is extremely unlikely, it may be within the judicial system's competence to balance the government interest

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<sup>51</sup> *Id.* at 648.

<sup>52</sup> *Id.* at 617.

<sup>53</sup> 14 C.F.R. § 67.1 (1994).

<sup>54</sup> Charles D. Curran, Note, *Mandatory Testing of Public Employees for the Human Immunodeficiency Virus: The Fourth Amendment and Medical Reasonableness*, 90 COLUM. L. REV. 720, 726 (1990) (citing *O'Connor v. Ortega*, 480 U.S. 709 (1987)). Curran also discussed substantive due process challenges to mandatory HIV testing but acknowledged that the Court's retreat from protecting fundamental rights through due process analysis made refuge in privacy and liberty rights problematic. *Id.* at 733.

<sup>55</sup> *Id.* Curran discusses the Fourth Amendment implications of mandatory workplace HIV testing in great detail.

<sup>56</sup> *Id.* at 748, 751 & n.171.

against the employee's expectation of privacy.<sup>57</sup> But in the context of potential neurological impairments caused by HIV infection, the scientific consensus is perhaps not as clearly developed. Consequently, the legislative forum may be more appropriate for balancing the politically-charged and still-developing issues.<sup>58</sup> Where complex scientific issues must be determined and where the courts do not have clear statutory guidance from Congress, to force-fit constitutional solutions upon these problems leaves the court's discretion, in the words of Justice Cardozo, "not canalized within banks that keep it from overflowing."<sup>59</sup> Fortunately Congress has sought to protect the rights of handicapped individuals, including individuals with HIV, through the Rehabilitation Act of 1973<sup>60</sup> and the Americans with Disabilities Act of 1990.<sup>61</sup>

#### B. REHABILITATION ACT OF 1973

Since 1973 a major source of claims by disabled persons for employment discrimination has been the Rehabilitation Act of 1973 (Rehabilitation Act).<sup>62</sup> Section 504 of the Rehabilitation Act provides that:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .<sup>63</sup>

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<sup>57</sup> Such a balance was made in *City of Willoughby*, 779 F. Supp. at 417.

<sup>58</sup> But see Curran, *supra* note 54, at 751 (expressing concern that resolving the government's interests against employee privacy interests might result in "majoritarian discrimination" against the often-stigmatized group of persons with HIV).

<sup>59</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935). Justice Cardozo was actually referring to excess delegation from Congress to administrative agencies, but the phrase elegantly states the principle that in our democracy the nonrepresentative bodies must apply the laws that the representative body sets forth. To allow other, nonrepresentative bodies to operate without the guidance from the representative body leaves the discretion of the nonrepresentative body "unconfined and vagrant." *Id.*

<sup>60</sup> 29 U.S.C. §§ 794-797b (1988).

<sup>61</sup> 42 U.S.C. §§ 12101-12117 (Supp. V 1993).

<sup>62</sup> 29 U.S.C. § 794-797b (1988).

<sup>63</sup> *Id.* § 794(a).

Although air traffic controllers may bring claims against the FAA under the Rehabilitation Act,<sup>64</sup> the Supreme Court foreclosed any such claims against airlines (as indirect beneficiaries of federal funds) in *United States Department of Transportation v. Paralyzed Veterans of America*.<sup>65</sup> Nonetheless, since Congress intended the Americans with Disabilities Act of 1990 (Americans with Disabilities Act or ADA)<sup>66</sup> to strengthen the protections of the Rehabilitation Act and to apply these protections to private employers, the judicial interpretation of the Rehabilitation Act is still instructive to interpret the relatively new Americans with Disabilities Act.<sup>67</sup>

A threshold question for application of section 504 of the Rehabilitation Act is whether the person complaining of the discrimination is an "individual with [a] handicap."<sup>68</sup> The seminal case for the application of the Rehabilitation Act to persons with AIDS was reluctantly provided by the Supreme Court in *School Board of Nassau County v. Arline*.<sup>69</sup> In *Arline*, the Court found the definition of "handicapped individual" under section 504 of the Rehabilitation Act to include "those who are *regarded* as impaired."<sup>70</sup> The *Arline* court found persons "regarded" as impaired by others to include persons with contagious diseases. Under this "regarded as impaired" standard, no requirement exists for a person to be "actually physically impaired"<sup>71</sup> to be disabled under the Rehabilitation Act. The Court found that persons who were regarded to be impaired were "limited in a major life activity."<sup>72</sup> The major life activity was work, and the persons were "limited" by the irrational fears of others that such persons might be contagious.<sup>73</sup> The Court may as well have

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<sup>64</sup> *Jenkins v. Skinner*, 771 F. Supp. 133, 134 (E.D. Va. 1991). In fact, government employees are specifically exempted from coverage of the Americans with Disabilities Act. 29 C.F.R. § 1630.2(e)(2)(i) (1994) (stating that "The term employer does not include—The United States . . .").

<sup>65</sup> *Department of Trans. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 604 (1986).

<sup>66</sup> 42 U.S.C. §§ 12101-12117 (Supp. V 1993).

<sup>67</sup> Laura Pincus, *The Americans with Disabilities Act: Employers' New Responsibilities to HIV-positive Employees*, 21 HOFSTRA L. REV. 561, 568 (1993).

<sup>68</sup> Gary Lawson, *AIDS, Astrology, and Arline: Towards a Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237, 244 (1989).

<sup>69</sup> 480 U.S. 273 (1987).

<sup>70</sup> *Id.* at 284 (emphasis added).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* Ironically, the employee in *Arline* was a schoolteacher with non-infectious tuberculosis (TB), a condition with obvious implications in the air transport-

been talking specifically about asymptomatic HIV-positive individuals. The Court specifically stated that it did not reach the question of whether carriers of the Acquired Immune Deficiency Syndrome (AIDS) virus might be handicapped individuals.<sup>74</sup> Nonetheless, lower courts and commentators quickly realized the significance of the *Arline* decision and applied the holding of *Arline* to HIV-positive individuals.<sup>75</sup>

Ultimately whether an employer may fire an employee because of her disability will depend on whether the employer can reasonably accommodate the disability.<sup>76</sup> The scope of the employer's responsibility to accommodate the employee's disability, as determined in a court of law, will be based on findings of fact given the state of medical knowledge.<sup>77</sup> Such findings of fact include: a) the nature of the risk; b) the duration of the risk; c) the severity of the risk; and d) the probability of the risk-event occurring.<sup>78</sup> In 1988 the General Counsel of the United States expressed an opinion that although the Rehabilitation Act covers asymptomatic HIV-positive individuals, such persons could be lawfully discriminated against in cases where the persons' disabilities posed particularly grave risks to themselves or others.<sup>79</sup>

In most cases, asymptomatic HIV-positive individuals should be found to be qualified for their positions under the Rehabilitation Act.<sup>80</sup> The Rehabilitation Act will only cover the small

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tation context. In 1992 a flight attendant who had previously tested positive for TB became infectious and probably infected three co-workers and possibly four passengers. Sandra G. Boodman, *Tracing the Path of Tuberculosis CDC Investigators Study the Case of a Flight Attendant With the Infectious Disease*, WASH. POST, Oct. 11, 1994, at Z11.

<sup>74</sup> *Arline*, 480 U.S. at 282 n.7.

<sup>75</sup> See, e.g., *Chalk v. United States Dist. Court*, 840 F.2d 701, 705 (9th Cir. 1987).

<sup>76</sup> *Hall v. United States Postal Serv.*, 857 F.2d 1073 (6th Cir. 1988).

<sup>77</sup> *Arline*, 480 U.S. at 288.

<sup>78</sup> *Id.*

<sup>79</sup> Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 1988 WL 391017 (1988) [hereinafter Kmieciak Opinion].

<sup>80</sup> See, e.g., *Doe v. City of Chicago*, 833 F. Supp. 1126 (N.D. Ill. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992) (holding that the District of Columbia violated the Rehabilitation Act in withdrawing an offer of employment as fire fighter solely because the applicant was HIV-positive). But see *Severino v. North Fort Meyers Fire Control Dist.*, 935 F.2d 1179 (11th Cir. 1991) (holding that HIV-positive fire fighter who was fired for his refusal to transfer to a light duty position was not discriminated against); *Leckelt v. Board of Comm'rs*, 909 F.2d 820 (5th Cir. 1990) (holding that a licensed practical nurse who refused to

percentage of air transportation workers that work for the United States government, such as air traffic controllers employed by the FAA. The Americans with Disabilities Act, however, will apply to airlines and other private employers.<sup>81</sup>

### C. AMERICANS WITH DISABILITIES ACT<sup>82</sup>

The text of the Americans with Disabilities Act (ADA) states, in pertinent part, that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees."<sup>83</sup> Although the ADA is an offspring of section 504 of the Rehabilitation Act,<sup>84</sup> the ADA is "more stringent" in that it specifically proscribes discrimination against persons with contagious diseases.<sup>85</sup> The ADA further prohibits employers from excluding workers based on conjecture about potential risks associated with their disabilities. The employer may still discriminate against a disabled individual if the employer shows that the individual poses a "direct threat,"<sup>86</sup> which the regulations define as "a significant risk of substantial harm" that cannot be reasonably accommodated.<sup>87</sup> The risk may be either to the individual or to others, including fellow employees or customers.<sup>88</sup>

To show that the ADA applies to HIV-positive persons, it is instructive to look to four sources: 1) statutory interpretation of

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submit results of his HIV testing was not otherwise qualified); *Anonymous Fireman v. City of Willoughby*, 779 F. Supp. 402, 417 (N.D. Ohio 1991) (holding that mandatory testing of municipal fire fighters was a permissible Fourth Amendment search because the "risk of HIV transmission in the performance of the duties of firefighter paramedic[s] is high.").

<sup>81</sup> Covered employers are generally those employers that employ more than 15 employees, except the United States government. 42 U.S.C. § 12111(5) (Supp. V 1993).

<sup>82</sup> 42 U.S.C. §§ 12101-12117 (Supp. V 1993).

<sup>83</sup> 42 U.S.C. § 12112 (Supp. V 1993).

<sup>84</sup> Pincus, *supra* note 67, at 567.

<sup>85</sup> 42 U.S.C. § 12113(d) (Supp. V 1993); *see also* 29 C.F.R. § 1630.16(e) (1994).

<sup>86</sup> 42 U.S.C. §§ 12113(a)-(b) (Supp. V 1993). The statute specifically and reasonably allows an employer to discriminate based upon qualification standards, which are standards that are job-related and consistent with business necessity. One of these standards may be that the individual not pose a "direct threat to the health or safety of other individuals in the workplace." *Id.* Presumably these broad requirements are acceptable to everyone, but as they say: The devil is in the details.

<sup>87</sup> 29 C.F.R. § 1630.2(r) (1994).

<sup>88</sup> *Id.*

the ADA;<sup>89</sup> 2) judicial interpretation of the ADA and of state statutes that parallel the ADA;<sup>90</sup> 3) interpretation by the federal agency charged with enforcement of the Act;<sup>91</sup> and 4) judicial interpretation of the parallel terms of the Rehabilitation Act.<sup>92</sup> Analysis of these sources leads to the conclusion that the Americans with Disabilities Act protects HIV-positive individuals from employment discrimination.

### 1. *Statutory Interpretation of the ADA*

The statutory definition of disability under the ADA is quite broad:

The term "disability" means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.<sup>93</sup>

HIV falls within this definition in at least two ways: a person could be *regarded* as being limited in employment because of her HIV status, thus placing her within category (C);<sup>94</sup> or a person's ability to procreate could reasonably be considered a major life activity in which that person is limited.<sup>95</sup>

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<sup>89</sup> See, e.g., 136 CONG. REC. H4623 (daily ed. July 12, 1990) ("[Persons with HIV] are covered under the first prong of the definition of disability in the ADA.") (statement of Rep. Owens); 136 CONG. REC. H4646 (daily ed. July 12, 1990) (same).

<sup>90</sup> Pincus, *supra* note 67, at 567-68, 570.

<sup>91</sup> The agency interpretation will generally be accorded substantial deference by the courts. Under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), *modified*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987), if the statute does not speak clearly and unambiguously with respect to a specific issue (and where the ambiguity is within any gap left by Congress to the agency) the agency interpretation is to be adopted by the courts unless it is unreasonable.

<sup>92</sup> See *supra* notes 62-80 and accompanying text.

<sup>93</sup> 42 U.S.C. § 12102(2) (Supp. V 1993).

<sup>94</sup> Thus employment would be the life activity in which she was limited. This is basically the codification of the *Arline* "regarded as impaired" standard, which was the subject of strong criticism in the Lawson article. Lawson contends that such a reading would render § 504 of the Rehabilitation Act so broad that if an employer rejected a potential employee based on his zodiacal sign, then the employer must regard the employee as being impaired and that therefore the employee would be handicapped under § 504 of the Rehabilitation Act. Lawson, *supra* note 68, at 270.

<sup>95</sup> Certainly one who is HIV-positive must be considered substantially limited in her ability to procreate, have sexual contact, and have normal social relationships. *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994).



Even if one is not persuaded that the statutory language is unambiguous, the legislative history of the bill leaves no doubt. Public awareness of AIDS and HIV was, and continues to be, very high. During consideration of the bill, a sponsor of the legislation stated that persons with HIV were "covered under the first prong of the definition of disability in the ADA."<sup>96</sup> In other words, the ADA was passed in 1990 under the understanding that persons with HIV are persons who are "substantially limited in a major life activity" as set out in category (A) above, and thus are "disabled" within the meaning of the ADA.<sup>97</sup>

## 2. *Judicial Interpretations of the ADA and Parallel State Statutes*

Courts have confirmed that "being HIV-positive places one within the protection of the [Americans with Disabilities] Act."<sup>98</sup> In one such holding, a district court went through an extended statutory analysis of the Act to find that persons with HIV are covered by the ADA.<sup>99</sup> This particular case had captured the public interest because of its substantial similarity to the popular 1993 film entitled "Philadelphia."<sup>100</sup> In short, the plaintiff in *Doe v. Kohn Nast & Graf* was a lawyer whose work had often been praised before he learned that he was infected with HIV.<sup>101</sup> Allegedly, the firm subsequently learned of the plaintiff's condition and ceased to assign work to him, began to criticize the quality of his work, ceased giving him pay increases, and eventually fired him.<sup>102</sup> The court held that the plaintiff had successfully "met his threshold burden of establishing his prima facie case of disability discrimination" and that his HIV discrimination suit could proceed.<sup>103</sup> This same federal district court had previously found that a person with "full blown AIDS"<sup>104</sup> fell

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<sup>96</sup> 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens).

<sup>97</sup> 42 U.S.C. § 12102(2)(A) (Supp. V 1993).

<sup>98</sup> *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994); see also *United States v. Morvant*, 1995 U.S. Dist. LEXIS 3739, at \*8 (E.D. La. 1995) (holding that it cannot be disputed that HIV persons are persons with disabilities under the meaning of the ADA); *Woolfolk v. Duncan*, 872 F. Supp. 1381 (E.D. Pa. 1995); *Doe v. City of Chicago*, 883 F. Supp. 1126 (N.D. Ill. 1994).

<sup>99</sup> *Kohn Nast & Graf*, 862 F. Supp. at 1319-21.

<sup>100</sup> Tom Hanks won an Academy Award as "Best Actor" for his portrayal of a lawyer who was fired because he had AIDS.

<sup>101</sup> 862 F. Supp. at 1310.

<sup>102</sup> *Id.* at 1315.

<sup>103</sup> *Id.* at 1321.

<sup>104</sup> *Id.*

within the scope of the Pennsylvania statute that paralleled the ADA.<sup>105</sup>

In interpreting the ADA, the *Doe v. Kohn Nast & Graf* court thought it significant that Congress had referred to disabled persons as being limited in a "major life activity" rather than, for example, a "major work activity."<sup>106</sup> The court was convinced that "major life activities" covered a lot of activities and that procreation must be one of those activities.<sup>107</sup> The court was further convinced that a person with HIV must be limited in her ability to procreate.<sup>108</sup> The court found supportive legislative history<sup>109</sup> and interpretive regulations<sup>110</sup> to buttress its conclusion that an HIV-positive individual may bring a claim of HIV discrimination under the ADA.<sup>111</sup> Once the plaintiff survived the defendant's summary judgment motion, the case was quickly settled out of court.<sup>112</sup>

### 3. Interpretation by the Federal Agencies

Further guidance is found in the interpretations of federal agencies charged with administering the ADA. The Act specifically charges the Equal Employment Opportunity Commission (EEOC) with administering the Title I ADA Regulations.<sup>113</sup> Courts must give great deference to the agency's regulatory interpretation of the statutes it enforces.<sup>114</sup> The EEOC defines "physical impairment" as:

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, re-

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<sup>105</sup> *Cain v. Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990).

<sup>106</sup> 862 F. Supp. at 1320.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1321.

<sup>109</sup> *Id.* at 1321 n.7.

<sup>110</sup> *Id.* at 1321 n.8.

<sup>111</sup> *Id.* at 1321.

<sup>112</sup> *Legal Issues/Litigation: Philadelphia AIDS Suit Settled*, AIDS WKLY., Nov. 14, 1994, at 13.

<sup>113</sup> 42 U.S.C. § 12116 (Supp. V 1993).

<sup>114</sup> *Cheuron*, 467 U.S. at 843; see also *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."). For an example of a district court applying *Cheuron* deference to an agency's interpretation of the ADA's definition of disabled as encompassing persons with HIV, see *United States v. Morvant*, 1995 U.S. Dist. LEXIS 3739, at \*8 (E.D. La. 1995).

productive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.<sup>115</sup>

Asymptomatic HIV infection should fall within the regulatory definition for "physical impairment" as a condition affecting the neurological or lymphatic systems.<sup>116</sup> It is important to remember that just because someone is "physically impaired" within the meaning of the ADA does not mean that her ability to perform her job, even a job as difficult as piloting an aircraft, is diminished. Physical impairment is a term of art, defined above. Thus a person may be "disabled" for the purposes of the statute without being perceived as "disabled" by a lay person.<sup>117</sup> This interpretation leads to the somewhat anomalous result that a person may be "disabled" for the purposes of the statute, but that discrimination against that person might be impermissible because the "disabled" person is outwardly unaffected by her disability and able to perform all her normal work activities.

Not only does the EEOC interpret the ADA to protect persons with HIV from discrimination, but the Justice Department, which enforces Titles II and III of the ADA, has also interpreted the ADA to protect HIV-positive individuals.<sup>118</sup> Similar to the court's deference in *Doe v. Kohn Nast & Graf* to the EEOC's interpretation of the ADA with respect to employment discrimination, courts will defer to the Justice Department's interpretation that persons with HIV are protected by the ADA; accordingly courts will enforce the ADA against those who discriminate in public accommodation against persons with HIV.<sup>119</sup> Another federal anti-discrimination statute is the Fair Housing Administration Act.<sup>120</sup> The regulations developed by the Department of Housing and Urban Development explicitly confirm that the Fair Housing Administration Act covers HIV-infected persons.<sup>121</sup>

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<sup>115</sup> 29 C.F.R. § 1630.2(h) (1994) (emphasis added).

<sup>116</sup> See, e.g., Turner et al., *supra* note 13, at 1561 (discussing measures of the effects of HIV-1 infection upon CD4+ lymphocytes); Richard Johnson, *Questions and Prospects Related to HIV-1 and the Brain*, in *HIV, AIDS, AND THE BRAIN* 313 (Richard Price & Samuel Perry eds., 1994).

<sup>117</sup> Turner et al., *supra* note 13, at 1919-20.

<sup>118</sup> 28 C.F.R. § 36.104(1)(iii) (1994).

<sup>119</sup> See *United States v. Morvant*, 1995 U.S. Dist. LEXIS 3739 (E.D. La. 1995) (holding that a dentist may not refuse to treat HIV-positive individuals).

<sup>120</sup> 42 U.S.C. § 3601 (1988).

<sup>121</sup> 24 C.F.R. § 100.201(a)(2) (1991); see also Patrick F. Summers, Comment, *Civil Rights: Persons Infected with HIV*: [Steward B. McKinney Foundation v. Town Planning & Zoning Commission]: Forcing the Aids Community to Live a Prophylactic Existence, 46 OKLA. L. REV. 531 (1993).

In sum, agencies uniformly have been willing to find persons with HIV to be protected by the relevant federal anti-discrimination statutes, and courts are likely to adopt these agency interpretations.

This Comment generally assumes that the courts will continue to follow the clear statutory language, legislative history, and agency interpretations, and will continue to find asymptomatic HIV infection to fall within the ambit of the Americans with Disabilities Act. However, the inquiry does not end there. The law will not protect air transportation employees from employment discrimination if the employer can show that the employee is "not otherwise qualified" and that the employer can make no "reasonable accommodation" to allow the employee to "perform the essential requirements of her or his position."<sup>122</sup> The next section focuses on whether HIV-positive persons are qualified to be employed in certain safety-related air transportation positions.

#### IV. THE CURRENT DEBATE OVER EMPLOYMENT OF HIV-POSITIVE INDIVIDUALS IN THE AIR LAW CONTEXT

##### A. APPLICATION OF THE STATUTORY AND REGULATORY SCHEME

Under the ADA, employers may require that employees not "pose [a] direct threat to the health or safety of other individuals in the workplace."<sup>123</sup> Generally, termination of HIV-positive employees has been justified based on fears of transmission of the virus to customers or co-workers. The courts have generally been skeptical of such claims.<sup>124</sup> A more relevant question for pilots is whether an asymptomatic, HIV-positive individual presents a heightened safety risk to the airline passengers because of diminished cognitive abilities.

HIV positivity is a disability within the broad definition set out by the ADA. Without more, however, it has nothing to do with a person's ability to pilot an airplane. The presence of antibodies

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<sup>122</sup> Pincus, *supra* note 67, at 573 (citing 29 C.F.R. § 1630.2(o) (1994)).

<sup>123</sup> 42 U.S.C. § 12113 (Supp. V 1993).

<sup>124</sup> *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987); *Roe v. District of Columbia*, 842 F. Supp. 563 (D.D.C. 1993) (holding that defendant did not demonstrate that the risk of transmission of Hepatitis B virus was anything but theoretical, therefore defendant did not meet his burden of showing plaintiff was not "otherwise qualified."); *Chalk v. United States Dist. Ct.*, 840 F.2d 701, 710-11 (9th Cir. 1988) ("theoretical risk" of transmission does not warrant barring teacher from classroom).

against the virus that causes AIDS yields a positive HIV test, but is just a precursor to the onset of a disease that in fifty percent of the cases will not appear until more than ten years after the initial infection.<sup>125</sup> Not until AIDS presents itself in one of several AIDS-characteristic diseases (including impaired cognitive skills) is the pilot's ability to perform her duties likely to be jeopardized.<sup>126</sup>

The EEOC regulations require that employers base a determination of whether a "direct threat" exists upon an "individualized assessment of the individual's *present ability* to safely perform essential functions of the job."<sup>127</sup> These regulations appear to preclude employment decisions based on a condition that "takes a significant time to develop."<sup>128</sup>

Counterbalancing the EEOC regulatory protections of a pilot's right to practice her profession<sup>129</sup> are FAA regulations that protect the flying public by, among other things, requiring medical certification of pilots and other flight crew members.<sup>130</sup> The authority for medical certification is delegated by the Administrator of the FAA to the Federal Air Surgeon and to medical examiners designated by the Federal Air Surgeon to examine and certify pilots and other flight crew members based upon "compliance . . . with applicable medical standards."<sup>131</sup> The current debate is over whether HIV-negativity may be one of these "applicable medical standards."<sup>132</sup>

#### B. THE POSITION ADVOCATING MANDATORY TESTING OF ALL PILOTS AND GROUNDING OF THOSE WHO ARE HIV-POSITIVE

Those calling for grounding HIV-positive pilots have based their arguments upon concerns for public safety. Courts have

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<sup>125</sup> Selnes & Miller, *supra* note 6, at 172 (citing A. Muñoz et al., *Acquired Immunodeficiency Syndrome (AIDS)-free Time After Human Immunodeficiency Virus Type 1 (HIV-1) Seroconversion in Homosexual Men*, 130 AM. J. EPIDEMIOLOGY 530-39 (1989)).

<sup>126</sup> *Id.*

<sup>127</sup> 29 C.F.R. § 1630.2(r) (1994) (emphasis added).

<sup>128</sup> James G. Frierson, *An Analysis of ADA Provisions on Denying Employment Based on Risk of Future Injury*, 17 EMPLOYEE REL. L.J. 603, 621 (1992).

<sup>129</sup> 29 C.F.R. § 1630 (1994).

<sup>130</sup> Federal Aviation Regulations, Medical Standards and Certification, 14 C.F.R. § 67.1 (1994).

<sup>131</sup> 14 C.F.R. § 67.25 (1994).

<sup>132</sup> See *supra* note 6, for a listing of various papers and letters debating this issue.

been generally receptive to arguments appealing to concerns for public safety and have sometimes allowed discrimination in view of any conceivable risk of impairment posed by a person's HIV-positivity.<sup>133</sup> Certainly a pilot's mental capabilities are of central concern to airlines and to the flying public. The FAA has attributed ninety percent of all airline accidents to pilot error.<sup>134</sup> "[P]iloting an airplane challenges an individual's motor coordination and mental responses to a much greater extent than does operating an automobile . . . because of the 'complex coordination requirements and multiplicity of tasks.'"<sup>135</sup>

An early study suggested that a decline in mental acuity might begin soon after initial infection with HIV.<sup>136</sup> However, more recent studies using more statistically significant sample sizes show no significant [cognitive] decline prior to the presentation

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<sup>133</sup> Daugherty v. City of El Paso, 56 F.3d 695, 698 (5th Cir. 1995) (stating that "courts have uniformly held that insulin dependent diabetics present an unacceptable risk, and are thus not otherwise qualified, to be employed" in positions implicating public safety); Wood v. Omaha Sch. Dist., 25 F.3d 667 (8th Cir. 1994) (finding no clear error in the district court's factual findings that insulin-using diabetics were not "otherwise qualified" under the Rehabilitation Act and could not reasonably be accommodated when there was testimony that hyperglycemia creates risk of sudden loss of vision and that hypoglycemia produces danger of sudden loss of consciousness); Bradley v. University of Texas M.D. Anderson Cancer Ctr., 3 F.3d 922 (5th Cir. 1993) (finding that while the probability of a surgical technician transmitting HIV to a patient to be small, the potential consequences of such an event rendered the technician not "otherwise qualified" under the Rehabilitation Act); Doe v. Attorney General of the United States, 814 F. Supp. 844 (N.D. Cal. 1992) (finding that a doctor who refused to be tested for HIV was not "otherwise qualified" to test FBI agents).

<sup>134</sup> Murnane v. American Airlines, Inc., 482 F. Supp. 135, 147 (D.D.C. 1979), *aff'd*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

<sup>135</sup> Denise U. Scofield, *Knowing When to Say When: Federal Regulation of Alcohol Consumption by Air Pilots*, 57 J. AIR L. & COM. 937, 945 (1992).

<sup>136</sup> Justin C. McArthur et al., *HIV Dementia: Incidence and Risk Factors*, in *HIV, AIDS, AND THE BRAIN* 260 (Richard Price & Samuel Perry eds., 1994). These early studies spawned a number of commentators analyzing the Rehabilitation Act to speculate that asymptomatic, HIV-positive individuals "whose jobs entail significant responsibility for the safety of others: bus drivers, *airline pilots*, *air traffic controllers*, police officers, elevator and fire inspectors, as well as a host of other jobs where an employee's mental deficiency or brain dysfunction could threaten the safety of others," would be not "otherwise qualified" because their condition would allegedly be a threat to the safety of others. Nicholas Hentoff, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public From AIDS-Related Health and Safety Hazards*, 30 ARIZ. L. REV. 571, 621 (1988) (emphasis added); see also Kmiec Opinion, *supra* note 79 (advising the Counsel to President Reagan on the application of § 504 of the Rehabilitation Act of 1973 to individuals infected with HIV).

in an individual of AIDS-defining symptoms.<sup>137</sup> Although it is understandable that the FAA will be conservative in analyzing conflicting scientific studies, the FAA should give due regard for progress in scientific understanding as HIV infection becomes better understood and better, more comprehensive studies are performed. Mandatory screening for HIV infection of any person posing any threat of catastrophe to the public would cast an extremely wide net. "Indeed, anyone who drives a car may put lives in jeopardy."<sup>138</sup> The next section examines the arguments against such widespread mandatory testing.

### C. THE POSITION DENYING THE NEED FOR MANDATORY TESTING AND GROUNDING OF HIV-POSITIVE PILOTS

The above-mentioned concerns for public safety have led to the "specter of a rush to widespread occupational screening for HIV infection."<sup>139</sup> In 1980, the World Health Organization (WHO) countered this reactionary tendency.<sup>140</sup> WHO stated that "there is no justification for HIV serologic[al] screening as a surrogate for detecting functional impairment" in asymptomatic persons.<sup>141</sup> WHO reached this conclusion based on the following: (1) the absence of evidence that HIV-positive, asymptomatic individuals have clinically significant neuropsychiatric abnormalities at any greater rate than HIV-negative control groups; and (2) the fact that "most longitudinal studies [have shown] stable function on [neuropsychological] tests until severe immunodeficiency . . . developed."<sup>142</sup> Despite WHO's statement that "otherwise healthy HIV-1 infected individuals are no more likely to be functionally impaired . . . than uninfected persons,"<sup>143</sup> the issue has remained controversial.<sup>144</sup>

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<sup>137</sup> McArthur et al., *supra* note 136, at 260. More recent studies demonstrate that asymptomatic HIV-positive individuals have no greater incidence of dementia than do members of control groups. Johnson, *supra* note 116, at 313.

<sup>138</sup> DAVID G. OSTROW & JEFF STRYKER, AIDS AND THE HEALTH CARE SYSTEM 39 (Lawrence O. Gostin ed., 1990).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Selnes & Miller, *supra* note 6, at 172 (citing World Health Organization, *Report of the Second Consultation on the Neuropsychiatric Aspects of HIV-1 Infection* (1990)).

<sup>142</sup> Johnson, *supra* note 116, at 313.

<sup>143</sup> Selnes & Miller, *supra* note 6, at 172 (citing World Health Organization, *Report of the Consultation on the Neuropsychiatric Aspects of HIV infection* (1988)).

<sup>144</sup> OSTROW & STRYKER, *supra* note 138, at 38.

WHO, in 1990, reiterated its concern for HIV-positive individuals. The organization claimed that "denial of access to employment . . . for otherwise healthy persons solely on the basis of HIV-1 serological status would represent a violation of human rights and lead to broad and destructive social implications."<sup>145</sup> Nonetheless, some medical commentators have recently called for mandatory screening and grounding of pilots for the presence of HIV antibodies.<sup>146</sup>

#### D. ANALYSIS OF THE CONFLICTING POSITIONS

Advocates for the disabled claim that "the public and our courts are propelled by the very fear and prejudice that Section 504 [of the Rehabilitation Act] and the ADA are designed to guard against."<sup>147</sup> The most strident voices advocating mandatory testing of commercial pilots and the grounding of those found to be HIV-positive will emphasize the few cases in which dementia is the "AIDS-defining illness."<sup>148</sup> Hugo Leimann Patt in one such comment stresses the supposed unpredictable nature of the onset of cognitive impairment.<sup>149</sup>

To uncover the fear and prejudice in these facially unbiased arguments, it is instructive to view the arguments through the lens of comparative risk analysis.<sup>150</sup> For example, would Leimann Patt "propose to discuss whether we should wait for an HIV-related commercial mishap" before grounding: 1) pilots with a genetic predisposition toward Parkinson's or other neurological diseases;<sup>151</sup> 2) pilots who menstruate;<sup>152</sup> 3) pilots who are

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<sup>145</sup> Selnes & Miller, *supra* note 6, at 172 (citing World Health Organization, *Report of the Second Consultation on the Neuropsychiatric Aspects of HIV-1 Infection* (1990)).

<sup>146</sup> Leimann Patt et al., *supra* note 6, at 70 (proposing that we not "wait for an HIV-related" mishap before instituting mandatory screening).

<sup>147</sup> Sidney D. Watson, *Eliminating Fear Through Comparative Risk: Docs, AIDS, and the Anti-Discrimination Ideal*, 40 BUFF. L. REV. 739 (1992).

<sup>148</sup> Selnes & Miller, *supra* note 6, at 172.

<sup>149</sup> Leimann Patt et al., *supra* note 6, at 72.

<sup>150</sup> Cf. Watson, *supra* note 147, at 739 (arguing that doctors who are HIV-positive pose no greater threat than those with hepatitis or found liable, even once, in any malpractice proceeding, or going through a divorce or loss of a loved one).

<sup>151</sup> For a discussion of some of the genetic aspects of Parkinson's disease, see W.G. Johnson, *Genetic Susceptibility to Parkinson's Disease*, 41 NEUROLOGY 82, 88 (1991) (discussing genetic susceptibility factors and their linkage to environmental precipitating factors).

<sup>152</sup> "Between three [and] eight percent of cycling females suffer from severe symptoms of irritability, depression, anger, [and] impulsivity . . . during the week



new mothers;<sup>153</sup> and 4) pilots with a family history of alcoholism.<sup>154</sup> The FAA and the airlines have dealt with the health problems of pilots on an individualized basis in the past. For example, pilots who have been grounded for cardiovascular disease or alcoholism have been allowed to resume flying upon recertification by the FAA.<sup>155</sup> Accordingly, it would be reasonable to expect airlines to deal with the problem of HIV positivity on an individualized basis.

Ironically, the calls for grounding of HIV-positive pilots correspond generally with a decline of support for the Age 60 rule.<sup>156</sup> The premise upon which the Age 60 rule is based is quite similar to that upon which Leimann Patt relies. Namely, "[t]he age association of dementia in later life has been well documented, [citation omitted] although the absolute prevalence and incidence are not agreed upon."<sup>157</sup> In the absence of accurate individual testing, giving due regard to the tremendous public safety

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prior to menstruation." Michael McGuire, *Biochemical Screening to Predict Behavior*, 65 S. CAL. L. REV. 565, 576 (1991).

<sup>153</sup> With motherhood comes the accompanying possibility of post-partum psychosis which is a temporary condition that occurs to women in about 1 out of 1000 births. Deborah W. Denno, Symposium, *Gender Issues and the Criminal Law: Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. 80, 138 n.304 (citing Terra Ziporyn, "Rip van Winkle Period" Ends for Puerperal Psychiatric Problems, 251 JAMA 2061, 2061-62 (1984)).

<sup>154</sup> Strong evidence points to inheritability of alcoholism. George Winokur et al., *Alcoholism: Diagnosis and Familial Psychiatric Illness in 259 Alcoholic Probands*, 23 ARCHIVES GEN. PSYCHIATRY 104 (1970).

<sup>155</sup> *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 407 (1985) (citing the lack of evidence that flight engineers over age 60 are any less qualified than pilots who have been grounded for cardiovascular disease or alcoholism). *Criswell* stands for the proposition that airlines should deal with aging pilots on an individualized basis. The argument is similarly persuasive when applied to HIV-positive pilots.

<sup>156</sup> See Stanley R. Mohler, *Reasons for Eliminating the "Age 60" Regulation for Airline Pilots*, 52 AVIATION, SPACE, & ENVTL. MED. 445, 445 (1981) (arguing against the Age 60 rule, 14 C.F.R. § 121.383(c) (1994)); Beatrice K. Barklow, Comment, *Rethinking the Age Sixty Mandatory Retirement Rule: A Look at the Newest Movement*, 60 J. AIR L. & COM. 329, 368 (1994) (predicting a dismantling of the Age 60 rule upon the development of a "comprehensive testing battery"); see also Steven Morris, *Grounded at 60: Pilots Cite Experience in Renewing Fight Against FAA Retirement*, CHI. TRIB., Mar. 1, 1992, at 1 (reporting that McDonnell Aircraft, General Dynamics, Northrop, and NASA also allow flights by test pilots over 60); *Older Pilots*, S.F. CHRON., Apr. 23, 1990, at A18 (chronicling Boeing's use of test pilots of up to age 63 in settlement of a lawsuit).

<sup>157</sup> Marcel E. Salive, *Evaluation of Aging Pilots: Evidence, Policy, and Future Directions*, 159 MIL. MED. 2:083, 2:084 (1994).

interest in competent pilots, legitimate proxies may be used to ground pilots.<sup>158</sup>

As mentioned above, a pilot's cognitive ability and the potential effect of HIV positivity on that ability is an issue of great importance that deserves further study.<sup>159</sup> Optimally, tests that directly predict a worker's competence to perform a certain task would be used to qualify or disqualify that worker.<sup>160</sup> Unfortunately, such performance tests do not currently exist but are being studied.<sup>161</sup> Until actual performance tests exist, proxies for such direct performance evaluations must be used.

#### E. PROPOSAL OF AN APPROPRIATE TEST FOR DISCRIMINATING AGAINST HIV-POSITIVE PILOTS

HIV positivity may be differentiated from aging in one important aspect. For aging pilots, advanced age may be the only non-performance based predictor of declining mental, physical, and psychological acuity. In the case of HIV positivity, however, a more legitimate proxy exists in the form of CD4+ lymphocyte measures.<sup>162</sup>

These CD4+ lymphocytes, or T-cells, have an important function in the body's immune system.<sup>163</sup> Accordingly, as the CD4+ lymphocytes are depleted by the HIV virus, the body's ability to fight infection is diminished.<sup>164</sup> A healthy person has a certain number of white blood cells, a certain proportion of these white blood cells are lymphocytes, and a certain proportion of these lymphocytes are CD4+ lymphocytes.<sup>165</sup> The progression of the disease from asymptomatic HIV infection to AIDS appears to be

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<sup>158</sup> Baker v. FAA, 917 F.2d 318, 321 (7th Cir. 1990).

<sup>159</sup> A research program to further evaluate the effects on performance of asymptomatic HIV-positive individuals was advocated by one group of researchers in 1993 based on that group's finding that a substantial minority of asymptomatic HIV-positive individuals exhibited slowed response times during performance measurements. Mapou et al., *supra* note 6, at 161.

<sup>160</sup> *Id.* at 160.

<sup>161</sup> *Id.* at 161. While CD4+ counts are probably the most commonly used marker of the progression of HIV infection, other measures have been scientifically analyzed. The actual set of laboratory parameters used to follow progression of HIV infection will come from the medical research community. The efficacy of CD4+ counts as well as other laboratory parameters, in predicting the onset of AIDS illnesses is discussed in M.J. Dolon et al., *Early Markers of HIV Infection and Subclinical Disease Progression*, 11 VACCINE 548 (1993).

<sup>162</sup> See *infra* Part VI.

<sup>163</sup> Turner et al., *supra* note 13, at "Immunology."

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

closely related to the CD4+ count.<sup>166</sup> The CD4+ count typically falls in an HIV-infected person at a rate of approximately 15 to 100/ $\mu$ L per year from a normal, uninfected count of between approximately 410/ $\mu$ L and 1540/ $\mu$ L.<sup>167</sup> "[M]ost AIDS-defining conditions occur after the CD4+ count drops below 200/ $\mu$ L."<sup>168</sup>

The CD4+ count may be differentiated from HIV tests, which merely provide a "Yes/No" answer as to whether a person is infected with the HIV virus or not. Such HIV tests give no indication of how long a person might live a normal life, unaffected by the hidden destruction of that person's immune system. In contrast, an HIV person's CD4+ count will gradually decrease as that person's disease progresses. Accordingly, this author believes that until a person's actual performance capabilities can be assessed, a proxy for performance capabilities based on the CD4+ counts will be a more equitable approach.<sup>169</sup>

## V. APPLICATION OF THE CD4+ PROXY TO DIFFERENT AIR TRANSPORTATION JOBS

Assuming a proxy must be chosen to discriminate against HIV-positive individuals,<sup>170</sup> this Comment argues that the proxy chosen should be the one which most closely relates to actual performance characteristics. The CD4+ lymphocyte measures form a more objective standard of prediction than HIV positivity.<sup>171</sup> No testing should be done for presence of the HIV antibodies because HIV positivity is not by itself a condition relevant to a pilot's competency to fly an airplane (or the competency of any other air transportation worker to perform his or her tasks).

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at "Clinical Complications of Various States . . . ."

<sup>169</sup> See *infra* Part V for a discussion of the mechanics of implementing CD4+ lymphocyte measures and the important confidentiality protections that should accompany such testing.

<sup>170</sup> The proxy would be chosen over performance-based testing for all individuals within a particular position.

<sup>171</sup> Cf. Maj. Richard J. Barohn et al., *Peripheral Nervous System Involvement in a Large Cohort of Human Immunodeficiency Virus-Infected Individuals*, ARCHIVES NEUROLOGY 167 (Feb. 1993) (documenting the relationship between CD4+ lymphocytes and peripheral neuropathies).

It is worth noting that the Age 60 Rule does not apply to flight engineers<sup>172</sup> or to anyone else other than pilots or first officers flying for commercial operators as certified under Part 121 of the Federal Aviation Regulations.<sup>173</sup> In general, different safety standards apply to pilots relative to other members of the flight crew such as flight engineers and navigators. It is reasonable to conclude that different safety standards may apply with respect to a pilot with AIDS or HIV than would apply to a flight engineer or navigator with AIDS or HIV. Similarly, flight engineers, navigators, air traffic controllers, mechanics, and repairmen all have separately defined qualifications under the regulations.<sup>174</sup> Still different safety standards might apply to flight attendants, although the FAA does not require certification of flight attendants.<sup>175</sup> Below, this Comment applies a CD4+ test to all positions where our legal system may choose to impose such a proxy.

#### A. PILOTS

The most dangerous situation is when reduced cognitive function begins without any other accompanying AIDS-defining illness. In approximately four percent of reported cases, however, dementia is the AIDS-defining illness. Since in this case the patient would have had a reduced CD4+ lymphocyte count (coinciding with "significant immunosuppression"),<sup>176</sup> perhaps pilots should be tested for reduced levels of CD4+ lymphocytes.<sup>177</sup> Most appropriately, the FAA could undergo fact-finding to set a

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<sup>172</sup> See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 423 (1985) (holding that applying the FAA's Age 60 retirement rules to flight engineers violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1) (1988)).

<sup>173</sup> 14 C.F.R. 121.1 (1994).

<sup>174</sup> See, e.g., 14 C.F.R. § 63.31 (1994) (flight engineer certification); *id.* § 63.51 (flight navigator certification); *id.* § 65.31 (air traffic controller certification); *id.* § 65.71 (mechanic certification); *id.* § 65.101 (repairman certification).

<sup>175</sup> Flight attendants are apparently viewed as important to a aircraft's safe operation. Because each flight carries a minimum number of flight attendants and their location on the aircraft, the training that the airline must provide to flight attendants is specified in the regulations. 14 C.F.R. § 121.391 (1994).

<sup>176</sup> Selnes & Miller, *supra* note 6, at 172 (citing WHO policy statement).

<sup>177</sup> Some questions have been raised by researchers as to the "accuracy and precision of CD4+ measures." Turner et al., *supra* note 13, at 1561. "[T]he CD4+ count appears to be closely related to disease progression," but other factors such as age, drug use, and test precision can affect the measurements. *Id.* at *Factors Influencing the CD4+ T-Lymphocyte Cell Count Assay*. The Turner article proposes approaches to address the variability of CD4+ measures.

minimum safe CD4+ level for pilots.<sup>178</sup> In this manner, only pilots with severe immunosuppression will be identified. Pilots with this severe immunosuppression have a significant (fifteen to twenty percent) possibility of diminished mental capacity.<sup>179</sup> Such CD4+ testing should not be prohibitively expensive.<sup>180</sup> Most importantly, HIV-positive individuals will not be singled out by such a test until their conditions present an actual danger to the flying public. In this way the stigma of being HIV-positive does not attach to the pilot until they develop significant immunosuppression. At the very least, CD4+ testing instead of HIV testing would prevent the HIV stigma from attaching for at least as long as it takes to be able to perceive a trend from the diminishing CD4+ levels. Since the CD4+ levels decrease from the level of above 1000/ $\mu$ L at a rate of 15 to 100/ $\mu$ L per year,<sup>181</sup> a clear trend would not be casually observable in the short term.

When actual symptoms of AIDS begin to manifest themselves, or when CD4+ lymphocyte cell counts are greatly reduced (making the likelihood of AIDS-related mental deficiency much greater), the employer could then fire the pilot, or preferably transfer the pilot to a position that makes good use of his skills. Removal of the pilot from his position may be necessary at this time because of the significant possibility (approximately between fifteen and twenty percent<sup>182</sup>) that over time the pilot will develop dementia.<sup>183</sup> If performance-based testing became feasible at some time, a pilot who exhibited AIDS-defining illnesses could theoretically continue flying until the performance-based testing showed her to be unqualified.

If the pilot is transferred to a position that still entails pivotal responsibility for the lives of travellers, the position should be such that signs of diminished mental abilities can be observed by periodic testing. Alternatively, if the pilot's new position does not directly implicate passenger safety, for instance where the

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<sup>178</sup> Such a level would probably be between 200/ML ("[M]ost AIDS-defining conditions occur . . . below 200/ML." Turner et al., *supra* note 13, at *Clinical Complications of Various States*.) and 500/ML ("While the CD4+ remains above approximately . . . 500/ML, most individuals manifest few signs of HIV-1 infection." *Id.*).

<sup>179</sup> Johnson, *supra* note 116, at 313.

<sup>180</sup> The cost of CD4+ tests are estimated to be between \$65 and \$300. Turner et al., *supra* note 13, at *Immunology*.

<sup>181</sup> *Id.* at *Impact of HIV-1 Infection on CD4+ Lymphocytes*

<sup>182</sup> Johnson, *supra* note 116, at 313.

<sup>183</sup> Of course the pilot *always* had between a 15% and 20% chance of dementia; only now the risk is more immediate.

pilot is reassigned as a ground instructor, no testing of the individual's medical status will be necessary because signs of incompetence may be directly observed in the individual's performance without these signs posing a direct threat to the public. Perhaps in many such cases, the individual will voluntarily retire, avoiding the need to balance the person's civil rights against a business's need to exercise its best discretion and business judgments, especially in light of the business's legal responsibilities for its employees' actions.

Airlines are likely to "fire first and ask questions later" without a federal mandate arising out of statute, regulation, or case law. The airline will balance potential damages from a civil rights action by a person belonging to a stigmatized group against potential tort damages for allegedly allowing a person who is incompetent by reason of her disability to perform her job. The individual with HIV has about a fifty percent chance of living another ten years,<sup>184</sup> lessening the possibility of high compensatory damages in the wrongful discharge suit. Airlines will probably view the small potential liability for wrongful discharge as inexpensive insurance against charges of negligence for allowing an HIV-positive individual to continue flying. This conclusion will have little to do with actual risks posed by the pilot.

Courts are generally deferential to the airline's employment decisions with respect to issues of passenger safety,<sup>185</sup> absent some explicit direction from the Congress or the Federal Agencies (FAA or NTSB) to the contrary. However, the Supreme Court in applying the Age Discrimination in Employment Act (ADEA)<sup>186</sup> has held that: (1) a jury need not defer to the employer's expert witnesses even with respect to the employer's desire to conservatively deal with safety issues;<sup>187</sup> (2) a trier of fact may not give complete deference to an employer's decision, "[e]ven in cases involving public safety";<sup>188</sup> and (3) "the [bona fide occupational qualification] BFOQ standard is one of rea-

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<sup>184</sup> Selnes & Miller, *supra* note 6, at 172.

<sup>185</sup> *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 372 (4th Cir. 1980) (reversing the trial court's holding that the defendant airline violated Title VII by grounding flight attendants who were more than 13 weeks pregnant); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 677 (9th Cir. 1980) (finding that the defendant airline could immediately require a flight attendant to take maternity leave upon learning of her pregnancy).

<sup>186</sup> 29 U.S.C. § 621 (1988).

<sup>187</sup> *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 423 (1985).

<sup>188</sup> *Id.*

sonable necessity, not reasonableness."<sup>189</sup> The person with HIV may thus hold out some hope for judicial protection from discrimination under the federal anti-discrimination statutes.<sup>190</sup>

Specific protections for pilots with HIV are not likely to be forthcoming from the FAA or Congress,<sup>191</sup> considering the existence of the Age 60 rule despite politically powerful American Association of Retired Persons' (AARP) position that "[r]etirement policies based on chronological age do not take into account individual differences and are discriminatory on their face."<sup>192</sup> Accordingly, it is hard to imagine that the political clout of HIV-positive persons will be sufficient for Congress or a federal agency to make changes that are likely to generate such political controversy.

Perhaps leadership in protection for HIV-positive individuals will come from the medical community. "The determination that a person poses a 'direct threat' shall be based on . . . a reasonable medical judgment that relies on the *most current* medical knowledge and/or on the best available objective evidence."<sup>193</sup> A shift in position by the American Medical Association (AMA) from their position of agnosticism<sup>194</sup> to a position that accords with the position advanced by the World Health Organization (denying the need for mandatory testing and grounding of HIV-positive aviators),<sup>195</sup> the National Institute of Mental Health,<sup>196</sup> and Selnes & Miller<sup>197</sup> would carry great weight. Given the delegation of the FAA Administrator's authority to the medical profession for the certification of pi-

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<sup>189</sup> *Id.* at 419.

<sup>190</sup> Americans with Disabilities Act, 42 U.S.C. § 12101 (Supp. V 1993); Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988).

<sup>191</sup> The FAA may be rather limited in its ability to act in a way that might be seen as lessening public safety protections. Specifically, statutory law governing the Secretary of Transportation's actions requires that "maintaining safety" be the "highest priority in air commerce." 49 U.S.C.A. § 40101(a)(1) (West 1995).

<sup>192</sup> 138 CONG. REC. S6, 485 (daily ed. May 12, 1992).

<sup>193</sup> Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2 (1994) (emphasis added).

<sup>194</sup> The AMA called for pilots to voluntarily report their HIV status to the FAA "so that safety determinations could be made." Rebecca Voelker, *Here's What to Look for in Disability Coverage for HIV*, 35 AM. MED. NEWS, Dec. 21, 1992, at 8.

<sup>195</sup> Selnes & Miller, *supra* note 6, at 172 (citing World Health Organization, *Report of the Second Consultation on the Neuropsychiatric Aspects of HIV-1 Infection* (1990)).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

lots,<sup>198</sup> the importance of leadership from the AMA becomes especially great.

#### B. FLIGHT DECK CREWMEMBERS OTHER THAN PILOTS

Flight engineers do not operate the flight controls of a commercial aircraft unless neither the captain nor the first officer are able to do so.<sup>199</sup> Their duties are thus "less critical to the safety of flight than those of a pilot."<sup>200</sup> Nonetheless, the flight engineer has "critical functions" in emergencies and could considerably disrupt normal flight operations if he became impaired.<sup>201</sup> Since between fifteen and twenty percent of individuals with severe immunosuppression exhibit diminished mental capacity,<sup>202</sup> flight engineers may also legitimately be subject to confidential CD4+ testing in the same manner as would be pilots.<sup>203</sup>

#### C. AIR TRAFFIC CONTROLLERS

Air traffic controllers are clearly considered central to air traffic safety. Air traffic controllers must be certified by the FAA,<sup>204</sup> are prohibited from using drugs,<sup>205</sup> and are tested for use of drugs.<sup>206</sup> If the government chooses to allow discrimination against HIV-positive individuals in safety-sensitive positions, the standard chosen should be one that most closely reflects the actual risks of cognitive decline. As with pilots and other flight

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<sup>198</sup> Federal Aviation Regulations, 14 C.F.R. § 67.25 (1994).

<sup>199</sup> *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 403 (1985).

<sup>200</sup> *Id.* at 406.

<sup>201</sup> *Id.*

<sup>202</sup> Johnson, *supra* note 116, at 313.

<sup>203</sup> Although in *Criswell* the flight engineers were not subject to the same stringent standards as pilots, the situation for potential diminished mental capacity from severe immunosuppression is distinguishable. Diminished mental capacity in those with severe immunosuppression is much more likely than diminished mental capacity in exceeding 60 years of age. For instance, in *Criswell*, the Court noted that several large commercial airlines employed flight engineers over 60 years old without any reduction in their safety records. *Criswell*, 472 U.S. at 407. If 15-20% (on a par with incidence of AIDS-induced dementia) of the flight engineers at these large carriers had been mentally diminished, it should have been evident from the trial record.

<sup>204</sup> Federal Aviation Regulations, 14 C.F.R. § 65.31 (1994).

<sup>205</sup> *Id.* § 65.46 (1994).

<sup>206</sup> Federal Aviation Regulations, pt. 121, app. I (1994). See also *Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990) (citing the government's "strong interest in assuring aviation safety" to justify invasion by random drug testing upon employees' privacy interests).



deck crewmembers, testing of air traffic controllers should be limited to CD4+ testing. CD4+ levels are only a legitimate proxy for actual performance qualifications if other tests do not exist for individually assessing a person's actual qualifications for employment.<sup>207</sup>

#### D. MECHANICS AND "REPAIRMEN"<sup>208</sup>

Although the FAA also requires certification for the positions of aviation mechanic and aviation repairman, from an air traffic safety standpoint the positions can be legitimately differentiated from flight deck crewmembers and air traffic controllers by considering the amount of supervision available. For the flight deck crewmembers, essentially no one supervises their activities. Emergency situations that may arise at 30,000 feet do not allow for checking and cross-checking of one another's work. Similarly, with air traffic controllers, the time frame in which critical situations develop also leaves life or death decisions in the hands of a single individual.

Mechanics and repairmen, conversely, are supervised and their work is inspected before the component or aircraft is returned to service.<sup>209</sup> Nonetheless, to compromise (potentially) the competency of aircraft mechanics and repairmen would unreasonably shift responsibility to the inspector for finding all of a potentially larger number of errors if, in fact, HIV positivity dulls the mental acuity of the mechanic or repairman. If skills testing cannot reliably predict diminished mental capacities in all employees, then CD4+ testing of mechanics and repairmen may be reasonable to at least identify those persons who stand a fifteen to twenty percent chance of developing diminished mental acuity.<sup>210</sup>

#### E. FLIGHT ATTENDANTS

Although flight attendants are not nearly as central to air traffic safety as pilots,<sup>211</sup> flight attendants do play an important role

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<sup>207</sup> See *Criswell*, 472 U.S. at 414.

<sup>208</sup> As certified under the Federal Aviation Regulations, 14 C.F.R. § 65.71 (1994).

<sup>209</sup> See, e.g., 14 C.F.R. § 43.7 (1994) (persons authorized to approve the return to service of aircraft and aircraft components). See generally Federal Aviation Regulations, 14 C.F.R. § 43.1 (1994).

<sup>210</sup> Johnson, *supra* note 116, at 313.

<sup>211</sup> *Murnane v. American Airlines, Inc.*, 482 F. Supp. 135, 147 (D.D.C. 1979), *aff'd*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (stating that

in air traffic safety.<sup>212</sup> The flight attendant's role in air traffic safety is primarily related to aircraft emergencies and most particularly to emergency evacuations.<sup>213</sup> Accordingly, airlines may be afforded deference by the courts in the firing or reassignment of flight attendants by reason of HIV positivity. Arguably, airlines might be given more deference with respect to the employment of flight attendants than mechanics or repairmen, since no FAA certification procedure exists with respect to flight attendants such as exist with respect to mechanics<sup>214</sup> and repairmen.<sup>215</sup> By not providing for certification of flight attendants, the FAA appears to have delegated responsibility for employment of qualified and medically competent flight attendants to the airlines.

As with pilots, however, HIV positivity is an impermissible proxy for other conditions that might render a flight attendant not otherwise qualified to perform his or her job. In *Western Air Lines, Inc. v. Criswell*,<sup>216</sup> the Court examined whether a minimum age might be a reasonably necessary standard,<sup>217</sup> that is a legitimate proxy for safety-related job qualifications.<sup>218</sup> The Court

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the FAA has attributed 90% of all airline accidents to pilot error); *Burwell v. Eastern Air Lines, Inc.*, 458 F. Supp. 474, 501 (E.D. Va. 1978) (finding that "[a] flight attendant's disablement, as opposed to the disablement of a pilot . . . does not directly endanger the passengers."), *aff'd in part, rev'd in part*, 633 F.2d 361 (9th Cir. 1980) (per curiam).

<sup>212</sup> *Burwell*, 633 F.2d at 377 (reversing the trial court's holding that the defendant airline violated Title VII by grounding flight attendants who were more than 13 weeks pregnant); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (finding that the defendant airline could immediately require a flight attendant to take maternity leave upon learning of her pregnancy).

<sup>213</sup> The FAA has demonstrated the importance with which it views the flight attendant's role by promulgating regulations with respect to the required number, location, and training of flight attendants. For example: airlines must provide at least one flight attendant for each 50 passenger seats on an aircraft, 14 C.F.R. § 121.391(a) (1994); the flight attendants must be located near exits to effect emergency evacuations of passengers, 14 C.F.R. § 121.391(d) (1994); and airlines must train flight attendants using FAA-approved courses, 14 C.F.R. § 121.421 (1994) (and many other subsections). *Harriss v. Pan Am. World Airways, Inc.*, 437 F. Supp. 413, 419 (N.D. Cal. 1977).

<sup>214</sup> 14 C.F.R. § 65.71 (1994).

<sup>215</sup> *Id.* § 65.101.

<sup>216</sup> 472 U.S. 400 (1985).

<sup>217</sup> *Id.* at 419.

<sup>218</sup> *Id.* at 416 nn.23-24 (citing numerous courts of appeals decisions applying *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) and 29 C.F.R. § 1625.6(b) (1984) for the proposition that in order to establish a legitimate bona fide occupational qualification (BFOQ) defense, the employer must show that: (1) substantially all individuals excluded because of a discriminatory charac-

went on to say that a discriminatory characteristic (age) may only be a legitimate proxy for a safety-related job if it would be "impossible or highly impractical to deal with the employees on an individualized basis."<sup>219</sup> Although the *Criswell* Court spoke of deference to airlines for safety decisions, the Court clearly did not hold airline decisionmaking in such high esteem as called for by prior lower court decisions.<sup>220</sup>

Because flight attendants have not been subjected in the past to demanding motor skill and cognitive response requirements on par with pilots, no reason exists to use HIV positivity or CD4+ lymphocyte measures as a proxy for valid qualifications that may be otherwise assessed on an individual basis.<sup>221</sup> Airlines seeking to fire an HIV-positive flight attendant cannot argue that because of an alleged potential transmission of the disease, such as through food and drink handling, the flight attendant's HIV-positivity poses a "direct threat" to the safety of passengers.<sup>222</sup> In short, an airline may not terminate a flight attendant solely by virtue of his HIV-positivity.<sup>223</sup> Termination of flight attendants can only occur when an HIV-positive flight attendant develops complications of AIDS rendering him unable to perform the functions of his job. Accordingly, pre- or post-employment HIV testing or CD4+ testing should not be permissible.<sup>224</sup>

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teristic are in fact disqualified, and (2) that "some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age").

<sup>219</sup> *Id.* at 414 (citation omitted). Such requirements are reflected in the ADA and the Rehabilitation Act in requiring employers to make an individualized determination as to whether absence of the discriminatory characteristic is truly a BFOQ. Regulations to Implement the Equal Employment Provisions of the ADA, 27 C.F.R. § 1630.5 (1994).

<sup>220</sup> See, e.g., *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 1001 (5th Cir. 1984); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 371 (4th Cir. 1980) (per curiam) (finding that a court should give "deference to the complexity of the task" an airline faces in managing the risk of in-flight disaster).

<sup>221</sup> Cf. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 418 (1985) (summarizing the evidence as showing that the FAA and the airlines "all recognized that the qualifications for a flight engineer were less rigorous than . . . for a pilot"). The qualifications for a flight attendant are even less rigorous than those for a flight engineer. See *Selnes & Miller*, *supra* note 6, at 172 (citing *Murnane*).

<sup>222</sup> Congress deleted, in conference, an amendment to the ADA that would have allowed employers to "pull HIV-infected workers from food handling activities." *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994).

<sup>223</sup> Cf. *Chalk v. District Court*, 840 F.2d 701, 707 (9th Cir. 1988) (holding that a teacher with AIDS cannot be prevented from teaching solely because of a speculative possibility of transmission of the HIV virus).

<sup>224</sup> See *supra* Part V.

#### F. SUMMARY OF SUGGESTED APPROACHES FOR THE VARIOUS AIR TRANSPORTATION POSITIONS

This Comment does not necessarily advocate any new testing of individuals employed in the field of aviation. However, *if* businesses or the FAA have concerns that HIV positivity poses a threat to the flying public, and if these concerns can be based on documented medical concerns, HIV positivity alone not be used as a proxy for other legitimate occupational qualifications.<sup>225</sup> At a maximum, only persons having job responsibilities that directly impact public safety be tested for severe immunosuppression as evidenced by a threshold CD4+ level.<sup>226</sup> Based on public safety concerns, the airlines and the FAA may legitimately test pilots, flight engineers, navigators, air traffic controllers, mechanics and repairmen for CD4+ levels. Further, CD4+ testing should be allowed only in the absence of performance-based testing that might individually assess whether a person is qualified physically, mentally, and psychologically for his or her position.<sup>227</sup> Because of the historically lesser demands placed upon flight attendants<sup>228</sup> and on the absence of certification for flight attendants, flight attendants should only be released or reassigned when the complications of AIDS render them obviously unable to carry out their responsibilities.

### VI. TESTING AND CONFIDENTIALITY OF AN EMPLOYEE'S OR APPLICANT'S HIV STATUS

#### A. PERMISSIBILITY OF TESTING UNDER THE ADA

The Americans with Disabilities Act places a number of limits for testing and inquiry into an employee or job applicant's potential disabilities. These limits would apply under either the AsMA proposal for HIV testing of all commercial airline pilots or under the CD4+ testing proposed herein.

The greatest restrictions placed by the ADA are on pre-employment inquiries. An employer may not make any pre-employment examination of a job applicant until extending a

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<sup>225</sup> Cf. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (holding that age is not a suitable proxy for legitimate qualifications of flight engineers).

<sup>226</sup> See *infra* Part VI for a discussion on the necessity for protecting the confidentiality of such tests.

<sup>227</sup> See *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985).

<sup>228</sup> See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981).

conditional offer of employment to that applicant.<sup>229</sup> Even then:

[the employer may only] condition an offer of employment on the results of such an examination, if— (A) all entering employees are subjected to such an examination regardless of disability; (B) information obtained regarding the medical condition or history of the applicant is . . . treated as a confidential medical record[; and] (C) the results of such examination are used only in accordance with [the ADA].<sup>230</sup>

The above provision presents a potential pitfall for the HIV-positive applicant. Ostensibly, the pre-employment exam (once the applicant has been extended a conditional offer) is not limited to a "job-related and consistent with business necessity"<sup>231</sup> inquiry. Presumably, the medical exam is not so limited because of the necessity to test for pre-existing conditions for insurance. The danger for the HIV-positive applicant is a potential breach of confidentiality. Of course, such a breach would violate the requirement that the applicant's medical health information be treated as a confidential medical record, but the applicant would have to discover and prove that the leak had occurred.

Testing of employees (as opposed to applicants) is appropriate under the Americans with Disabilities Act in two circumstances: 1) when the employee voluntarily agrees to submit to such an examination, including a voluntary medical history;<sup>232</sup> or 2) when the examination relates to a bona fide occupational qualification.<sup>233</sup> Any information obtained through voluntary submission by an employee is subject to the same confidentiality requirement<sup>234</sup> as set out above, with respect to pre-employment testing.<sup>235</sup>

Although disclosure of HIV test results poses an extreme risk of social stigma and employment discrimination toward the patient, disclosure of a patient's CD4+ cell count may also pose a significant risk.<sup>236</sup> A person with a highly diminished CD4+

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<sup>229</sup> 42 U.S.C. §§ 12112(d)(2)(A) & (d)(3) (Supp. V 1993).

<sup>230</sup> *Id.* § 12112(d)(3).

<sup>231</sup> *Id.* § 12112(d)(4)(A).

<sup>232</sup> *Id.* § 12112(d)(4)(B).

<sup>233</sup> *Id.* § 12112(d)(4)(A).

<sup>234</sup> *Id.* § 12112(d)(3)(B).

<sup>235</sup> See *id.* § 12112(d)(4)(C) (discussed *supra* notes 229-31 and accompanying text).

<sup>236</sup> FURROW ET AL., *supra* note 14, at 318. "If information about a person's AIDS infection or HIV positivity reaches employers, insurers, schools, family, or acquaintances it may have disastrous consequences." *Id.*

count is especially vulnerable to stigma and employment discrimination when his CD4+ count reaches a level that meets the Centers for Disease Control and Prevention (CDC) definition for AIDS,<sup>237</sup> since that person would be more likely to be perceived as having the disease.

#### B. PROTECTIONS OF CONFIDENTIALITY FOR HIV AND CD4+ TEST RESULTS

A person's HIV status and CD4+ counts may be protected information in one of several ways. One of the ways this information is protected is by the professional responsibility and customs of medical professionals. A second protection of confidentiality potentially comes from the United States Constitution, specifically from a right to privacy descending from *Whalen v. Roe*.<sup>238</sup> The third and most important<sup>239</sup> protection comes from statutes protecting the confidentiality of HIV-positivity and AIDS status.

The first and most historical protection of a person's HIV status and CD4+ cell level is afforded by a "fundamental concept of medical information confidentiality [dating] back at least as far as the Hippocratic Oath."<sup>240</sup> Although in certain cases, tort and contract claims have enforced this ancient protection, "where an accurate disclosure of information is made in good faith for a legitimate purpose, courts are generally reluctant to impose liability."<sup>241</sup> While the Hippocratic oath is a noble one, it does not very exactly confine the doctor in what information "should not be published abroad" and held as "holy secret[s]."<sup>242</sup> Not sur-

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<sup>237</sup> The CDC defines AIDS, in the absence of one of the presenting illnesses such as Kaposi's sarcoma, as having a CD4+ lymphocyte count of 200 cells/ML along with an HIV-positive diagnosis. Centers for Disease Control and Prevention, *HIV/AIDS Surveillance Report*, Table 11, Vol. 5, No. 4 (1994).

<sup>238</sup> 430 U.S. 589 (1977).

<sup>239</sup> Robert M. Gellman, *Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy*, 62 N.C. L. REV. 255, 294 (1984) (arguing that "the only practical way to develop suitable guidance defining the responsibilities of physicians, the right of patients, and the proper protection for medical information is through legislation").

<sup>240</sup> Roger Doughty, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 113, 116 (1994).

<sup>241</sup> FURROW ET AL., *supra* note 14, at 311.

<sup>242</sup> Gellman, *supra* note 239, at 267 (citing the Hippocratic oath and positing that the Oath and other medical professional standards are too broad and therefore provide "no clear guidance for modern physicians faced with disclosure decisions").

prisingly, doctors have made their own decisions regarding disclosure of HIV information, decisions with potentially devastating consequences for their patients.<sup>243</sup> Some physicians apparently believe that they have a duty to reveal a patient's HIV status—even to people who are at no risk of contracting the virus. In *Doe v. Roe*,<sup>244</sup> when the doctor (defendant) was asked by his attorney why he had told his patient's employer about his patient's HIV status, the doctor responded, "I had a moral obligation to do so."<sup>245</sup>

The source of a constitutional basis for protection of medical information could trace back to a right to privacy descending from *Whalen v. Roe*.<sup>246</sup> Constitutional claims are limited to situations in which the defendant is a state actor, i.e., a public employer or a private employer acting in compliance with a statute.<sup>247</sup> As in *Doe v. City of New York*,<sup>248</sup> courts may find persons to have a constitutional right to privacy in their HIV status.<sup>249</sup> Unfortunately, the "penumbras" and "emanations" from the implicit guarantees in the Bill of Rights<sup>250</sup> do not provide explicit guidance as to what actions would constitute an unconstitutional disclosure of a person's HIV status. The general difficulty with relying on constitutional protections of confidentiality of HIV-related medical records is that constitutional protections will be as vague as the ethical obligations under which the medical profession operates.

The vagueness of ethical and constitutional protections for privacy of medical records places doctors in an awkward position, given that doctors are potentially liable for foreseeable in-

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<sup>243</sup> See, e.g., *Behringer v. The Medical Ctr.* 592 A.2d 1251 (N.J. Super. Ct. App. Div. 1991) (chronicling the complete loss of his practice by an ENT surgeon whose HIV-positive status was not kept confidential by a medical center at which he was treated); see also *Doe v. Borough of Barrinton*, 729 F. Supp. 376, 384 n.8 (D. N.J. 1990) (listing numerous events in which persons were stigmatized and harassed for having AIDS or for being HIV-positive).

<sup>244</sup> 599 N.Y.S.2d 350 (N.Y. App. Div. 1993).

<sup>245</sup> Laura Clark, *When- and When Not- to Protect Patient Privacy; AIDS, U R Inquiries, and New Reporting Laws Have Complicated Confidentiality. Here's How to Steer Clear of Trouble*, MED. ECON. May 9, 1991, at 99.

<sup>246</sup> 430 U.S. 589 (1977).

<sup>247</sup> See Curran, *supra* note 54, at 725-26.

<sup>248</sup> 15 F.3d 264 (2d Cir. 1994).

<sup>249</sup> *Id.* at 267.

<sup>250</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

juries to third persons caused by patients' medical conditions.<sup>251</sup> This potential liability creates a tension with the doctor's ethical and legal obligation to maintain the confidentiality of the patient's medical information.<sup>252</sup> Without adequate statutory and regulatory guidance, a doctor will be placed in the dilemma of choosing between his potential plaintiffs (his patient for disclosure of her HIV status, or other persons for alleged injuries caused by their lack of knowledge of the patient's status). Further, without specific statutory guidance, the HIV-positive patient will be placed at the mercy of his physician's prejudices.

The ADA has provisions protecting the confidentiality of medical information regarding employees. As discussed in the preceding section<sup>253</sup> testing of employees and applicants is only appropriate when the examination is "job-related and consistent with business necessity."<sup>254</sup> Once such medical examination is completed, the medical records must be kept separately from the other employee records and treated, with several exceptions, as "confidential medical records."<sup>255</sup> The major exceptions to this confidentiality requirement are that an employee's supervisors and managers may be informed of necessary accommodations that must be made for the employee on account of her disability and safety personnel may be informed of the disability if the disability might require emergency treatment. The limitations on disclosure of medical information are perhaps more open-ended than one would hope. The apparent incorporation by reference of medical professional norms and ethical guidelines by requiring only that the patient's medical records be treated as "confidential medical records" is especially troublesome given the above-described variability in medical professionals' willingness to divulge patients' medical information.

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<sup>251</sup> See *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976) (holding that a psychiatrist has a duty to protect foreseeable victims from the dangers of his patient's violent acts).

<sup>252</sup> See generally Bruce A. McDonald, *Ethical Problems for Physicians Raised by AIDS and HIV Infection: Conflicting Legal Obligations of Confidentiality and Disclosure*, 22 U.C. DAVIS L. REV. 557 (1989).

<sup>253</sup> See *supra* Part V.

<sup>254</sup> 42 U.S.C. § 12112(d)(4)(A) (Supp. V 1993).

<sup>255</sup> *Id.* § 12112(d)(3)(B). The requirement that these records be treated as "confidential medical records" apparently refers back to the customary and ethical protections for these records described above. As such, the same problems with the absence of limits upon the doctor's discretion is inherent in the ADA definition.



More specific statutes specifically prohibiting disclosure of a patient's HIV or AIDS status may be more helpful.<sup>256</sup>

State legislatures enacted state statutes in response to the Centers for Disease Control and Prevention (CDC) conditioning the receipt of any federal AIDS funds upon the state protecting the "confidentiality of HIV-related information."<sup>257</sup> Statutory guidance could serve to protect both the doctor and the HIV-positive pilot. For example, the statute could specifically prohibit the doctor from disclosing the pilot's HIV and CD4+ status<sup>258</sup> until the pilot's CD4+ level reached the statutorily or regulatorily-defined threshold at which the pilot poses a direct threat to his passengers. Once this CD4+ threshold is reached, the doctor would be statutorily obligated to notify the FAA (or another designated authority), which could verify the information and coordinate proper notification of the airline.

The protection for the pilot under such statutes would obviously be the prevention of unwarranted disclosure of his or her HIV-related information. The protection for the doctor is two-fold. First, the doctor would be protected from suit by his patient for breach of confidentiality once the CD4+ threshold is reached. Second, the doctor would be protected from nearly automatic inclusion in any air disaster suit in which a pilot happened to be HIV-positive.

Support for statutes protecting the confidentiality of HIV status may be found in public policy. The very existence of many of the state confidentiality protections for HIV and AIDS testing is in large measure explained by the general belief that unless people are confident that their HIV status will not be disclosed they will be discouraged from seeking medical help. The other public policy consideration calling for confidentiality of an air transportation worker's HIV status is the need to prevent hysteria among passengers.<sup>259</sup>

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<sup>256</sup> Here the issue of preemption may be raised. If the ADA allows general disclosure of disabilities to managers and supervisors perhaps this provision will preempt state statutes that prohibit disclosure of a patient's HIV status.

<sup>257</sup> Doughty, *supra* note 240, at 128. "HIV-related information" is a category proposed by Doughty, *id.* at 184 n.2, to refer broadly to "any and all information regarding an individual's possible or actual exposure to HIV or manifestation of any HIV-related conditions."

<sup>258</sup> Other than to the state health agency as required by statute.

<sup>259</sup> The potential for hysteria lies in the fact that an HIV-positive air transportation worker will represent the confluence of three major phobias: flying, AIDS, and homosexuality to the extent some people view AIDS as a " 'divine punishment' for 'sodomitic practices' . . ." or the "pink plague." Leimann Patt et al.,

## VII. CONCLUSION

In summary, pilots and other air transportation workers are vulnerable to HIV discrimination. Federal anti-discrimination statutes exist to protect HIV-positive individuals. A person's HIV-positivity by itself does not pose a direct threat to the flying public, to co-workers, or to the worker himself.

A better measure of risk of diminished performance by air transportation workers infected with the HIV virus is the employee's CD4+ level. When the CD4+ level drops below a threshold level, such as 200/ $\mu$ L, the individual is much more likely to have a dramatic diminishing of mental capacity. To protect air transportation workers, statutory and regulatory protections must be developed to give clear guidelines for testing and for maintaining confidentiality of the employee's CD4+ status. The ADA's confidentiality provisions discussed above do not go far enough to provide adequate guidance to the medical community when deciding whether to disclose an air transportation worker's HIV status. Thus statutes and regulations more specific to the air transportation worker should be developed.

Unfortunately, no fail-safe predictors for an employee's competence exist. Employers should be hesitant to abandon qualified employees based on speculative risks, but decisions about persons with HIV have not always been made based on thoughtful reflection. The understandable difficulty for those making employment decisions in the air transportation field, however, is that employment decisions must sometimes be made on such speculative factors.

For obvious reasons, the aviation employment decisionmaker cannot always afford to sit back and wait to observe the effect of a certain medical condition on an employee's job performance. Nonetheless, HIV-positive individuals should not be intentionally or inadvertently singled out from other individuals with medical conditions. The statutory and regulatory scheme must insure that HIV-positive individuals are treated equitably and that the medical community share the responsibility for such equitable treatment.

The foremost concern must be passenger safety, but such concerns must be rationally and fairly applied. It would be a truly bitter irony if an air disaster occurred because we had wrapped ourselves in the self-righteous cloak of concern for passenger

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*supra* note 6, at 72 (disclaiming such labels as if they had been relegated to history books).

safety to replace an experienced, well-qualified HIV-positive pilot with a less-experienced and less-qualified HIV-negative pilot.

# Articles

